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Volume 89 — No. 22 — 8/25/2018

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NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF JANET BICKEL PHILLIPS (HUTSON), SCBD #6672 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Janet Bickel Phillips (Hutson) should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Thursday, Oct. 18, 2018**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

2018 OK CR 27

MARCUS HILLAND RUNNELS Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2017-136. August 9, 2018

OPINION

LUMPKIN, PRESIDING JUDGE:

¶1 Appellant, Marcus Hilland Runnels, was tried by jury and convicted of First Degree Murder (Count 1) (21 O.S.Supp.2012, § 701.7) and Assault with a Dangerous Weapon (Count 2) (21 O.S.2011, § 645) After Former Felony Conviction in District Court of Tulsa County Case Number CF-2015-6742.[1] The jury recommended as punishment imprisonment for life without the possibility of parole and a $10,000.00 fine in Count 1 and imprisonment for ten (10) years and a $5,000.00 fine in Count 2. The trial court sentenced accordingly, suspended payment of the fines, and imposed a $50.00 Victims Compensation Assessment and court costs in each count. The trial court ordered the sentences to run concurrently and granted Appellant credit for time served.[2] It is from these judgments and sentences that Ap-pellant appeals.

FACTS

¶2 Thomas Bryan resided with his wife, Lori Mangels, at 1328 North Birmingham Place in Tulsa, Oklahoma. Appellant lived with his mother in a nearby home. Appellant's grandmother resided near Bryan's home too. Mangels knew Appellant through a mutual acquaintance. Bryan knew Appellant and his green Saturn from his travels through the neighborhood.

¶3 On December 15, 2015, Bryan was helping his friend, Leland Mitchell, move into Bryan's home. The two men were in Bryan's front yard shortly after school let out that day. Bryan observed Appellant speed down the street in an unsafe manner while school children were walking nearby. Bryan hollered at Appellant to slow down but Appellant just kept going.

¶4 Mitchell and Bryan left to get another load of Mitchell's belongings. Mitchell drove Bryan's truck. Bryan followed on his motorcycle. On the way, Bryan observed Appellant's green sedan stopped on the street. Bryan approached the car and cussed Appellant. He exclaimed: "What the hell is wrong with you? You're gonna run over somebody and kill someone, you know? I realize you got two kids in your car, how would you like for them to get runned over."[3] Appellant responded by asking Bryan where his wife was at? Bryan drove off towards Mitchell's house. Appellant dropped his children off at his grandmother's house but allowed his younger brother to remain in the car. He chased after Bryan with his 12 gauge pump-action shotgun. Bryan noticed Appellant behind him just as Appellant fired two shots from his moving car. Bryan ran a stop sign and got away from Appellant.

¶5 Appellant visited Bryan's home while Bryan was at Mitchell's house. Lori Mangels was home and heard him honking. When she went to the front door, Appellant called to Mangels and told her that he needed to tell her something. Appellant beckoned Mangels to come to his car. When Mangels complied, Appellant asked her if she had heard those shots? Mangel asked, what shots? Appellant stated: "I took two shots at Thomas."[4] Appellant showed Mangels his shotgun. He explained that Bryan had called him the N-word while cussing him for speeding through the neighborhood. Appellant threatened that if he ever saw Bryan again he would blow Bryan's head off. This upset Mangels. After Appellant left, she phoned Bryan and told him what Appellant had threatened.

¶6 In response to Mangels' call, Bryan and Mitchell returned to Bryan's home. Everything was quiet for a few hours but Bryan soon observed Appellant's Saturn out front of his home on the security cameras he had installed on the front of his house. Appellant sat in the car for few minutes and then drove off. After Appellant drove by a second time, Bryan and Mitchell went out on the front porch. From approximately two blocks away, Appellant fired two shots while still seated in his car.

¶7 Bryan did not have a firearm inside his home. He only had a pellet gun and a BB gun. Hoping to scare Appellant, Bryan shone a red laser pointer from his flashlight at Appellant's car. In the darkness, the laser shone very well. Bryan also held the pellet handgun. Appellant was undeterred by Bryan's actions. He started to circle the block around to Bryan's home again. Concerned that Appellant would shoot at his house, Bryan had Mangel hide inside the back part of the home. Bryan ran and hid between his house and his neighbor's home.

¶8 Against Bryan's advice, Mitchell went to his Grand Am to move it so that it would not get shot up. He drove the vehicle in reverse out of Bryan's driveway and into the street. Appellant fired two shots at Mitchell from the street one-half of a block south of Bryan's home. One of the slugs struck Mitchell in the head, killing him. After Appellant drove off, Bryan found Mitchell in the still-running car with a golf ball size hole in his forehead.

¶9 Dr. David Arboe of the State Medical Examiner's Office performed an autopsy on Mitchell's body. Arboe found that the slug had entered Mitchell's left forehead area, damaged several structures and exited the right posterior head. This wound caused Mitchell's death.

¶10 The Tulsa Police Department responded to Mangel's 911 call. They recovered the slug from the back window shelf of Mitchell's car. Officer Alisa Parrott located two pieces of shotgun wadding one-half block away from Bryan's home at the corner of Birmingham Place and Newton Place. Bryan identified Appellant as the shooter to the investigating officers. Officer Adam Dawson went to the home of Appellant's grandmother but Appellant was not there.

¶11 Sergeant David Walker found Appellant's green Saturn on the side of the road half way between Bryan's house and the home of Appellant's mother. Officer Vic Regalado responded to Appellant's residence with several other officers. When the officers approached the house, the interior lights and Christmas tree lights were turned off. No one answered the door. The officers maintained a perimeter around the home. Appellant surrendered to the SWAT Team approximately two hours later, after a police negotiator was able to persuade both Appellant and his family to exit the home.

¶12 Sergeant Walker helped execute a Search Warrant on Appellant's residence. He discovered a set of Saturn keys hidden under a mattress in one of the bedrooms. Walker further found a Western Field brand pump action shotgun in the closet of the master bedroom. Detective Kyle Ohrynowicz also helped search the home. He discovered a shotgun shell in the floor of the master bedroom. Ohrynowicz also found a box of Winchester brand 12 gauge shotgun shells in a drawer in the home. The shells were one ounce slug rounds.

¶13 Detective Richard Aschoff executed a Search Warrant on Appellant's Saturn. He found a spent Winchester brand shotgun shell pinched in the hinge between the door and the body of the vehicle. Aschoff also discovered a couple of live shotgun shells in the car. Both of the shells were slug rounds.

¶14 Forensic Firearm Examiner, Joy Patterson, compared the spent shotgun shell recovered from the Saturn with the shotgun found in Appellant's residence. Patterson determined that the shell had been fired from the weapon.

¶15 Detective Justin Ritter interviewed Appellant the next morning. After waiving his rights under *Miranda*,[5] Appellant immediately asked: "What am I in here for?"[6] Appellant admitted driving the green Saturn but wholly denied any knowledge of a confrontation with Bryan. He denied speeding that day and disallowed that a guy on a motorcycle had come up to him complaining about his driving. After Ritter confronted Appellant with the fact that his fifteen year old brother had confirmed that the confrontation had occurred, Appellant finally acknowledged that Bryan had confronted him. He complained that Bryan had called him the N-word but related that he had gone back to his home and played video games afterward. Appellant denied shooting at Bryan while he was riding the motorcycle. He asserted that he did not have a shotgun. Appellant admitted that he spoke to Lori Mangels but claimed that he had told her that everything was cool. He related "I guess the dude got shot . . . people calling me already."[7]

¶16 When Ritter advised Appellant that they had found the shotgun in his house, the wadding on the street corner, and the slug in Mitchell's car, Appellant admitted to possessing the shotgun and firing it that day. He claimed that a few hours after the confrontation Bryan had pointed the laser pointer at him and fired a

handgun at both him and his little brother. Appellant asserted that he had fired the shotgun one time into the air and then went back home. He was very adamant that he only fired the shotgun one time that day. Appellant related that he was familiar with the weapon and indicated that he practiced with the shotgun regularly at his family's farm.

¶17 Ritter accused Appellant of lying and advised him that Mitchell had died after being shot in the head. Ritter indicated that the officers intended to compare the slug recovered from Mitchell's car and compare it to Appellant's shotgun. Appellant feigned crying and exclaimed, "I don't know if I shot that dude man. If it did happen I didn't mean for that to happen." No sooner than he began crying, Appellant stopped. He confessed that when the car backed out of Bryan's driveway, he had fired two shots down the street at it. Appellant admitted that prior to the shooting he was safe at home. He could not explain why he went back to Bryan's house and lamented that his friend had told him to leave it alone. Appellant admitted that initially he had "lied" to Ritter but asserted that he was just trying to scare Bryan.

DISCUSSION

¶18 In his first proposition of error, Appellant challenges the trial court's instruction on transferred intent. He concedes that he waived appellate review of this claim for all but plain error when he failed to raise this challenge at the time of trial. *Stewart v. State,* 2016 OK CR 9, ¶ 25, 372 P.3d 508, 514. Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *Id.* Under this test, an appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Id.* This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

¶19 Appellant argues that the trial court erred when it failed to choose "kill" from the list of options in the uniform jury instruction for transferred Intent. Reviewing the record, we find that Appellant has shown an error that is plain or obvious. Instructions are sufficient where they accurately state the applicable law. *Reed v. State*, 2016 OK CR 10, ¶ 15, 373 P.3d 118, 122.

¶20 The doctrine of transferred intent is firmly rooted in Oklahoma case law. *Jackson v. State*, 2016 OK CR 5, ¶ 8, 371 P.3d 1120, 1122; *Short v. State*, 1999 OK CR 15, ¶ 44, 980 P.2d 1081, 1098. The uniform instruction concerning transferred intent provides:

> If you find that the defendant intended to **kill/injure/assault [Name of Intended Victim]**, and by mistake or accident **injured/assaulted [Name of Actual Victim]**, the element of intent is satisfied even though the defendant did not intend to **kill/injure/assault [Name of Actual Victim]**. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

Instruction Number 4-11, OUJI-CR(2d)(Supp. 1997). We note that the bolded language within the instruction is intended to signal to the trial court that the instruction must be modified before given to the jury. The slash symbol is intended to cause the trial court to elect the alternative(s) which most accurately fits the case at trial. Because the transferred intent doctrine directly relates to the relevant *mens rea* element of the charged offense, the trial court should have chosen "kill" from the alternatives of "kill/injure/assault." *See Jackson*, 2016 OK CR 5, ¶¶ 6, 9, 371 P.3d at 1122-23; 21 O.S.Supp. 2012, § 701.7(A) (setting forth *mens rea* element of malice murder as a deliberate intention to unlawfully take away the life of another human being).

¶21 Instead, the trial court instructed the jury as follows:

> If you find that the defendant intended to kill/injure/assault THOMAS BRYAN, and by mistake or accident killed LELAND MITCHELL, the element of intent is satisfied even though the defendant did not intend to kill LELAND MITCHELL. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

Since this instruction permitted the jury to find that Appellant had the intent to kill Mitchell based upon a pre-existing intent to injure or assault Bryan the instruction failed to accurately set forth the Rule of Law concerning transferred intent.

¶22 However, we find that Appellant has not shown that this error affected his substantial rights. A "substantial right" is a matter of sub-

stance as distinguished from a matter of mere form. *Simpson*, 1994 OK CR 40, ¶ 10, 876 P.2d at 694. Errors that affect substantial rights are those "'which go to the foundation of the case, or which take from a defendant a right which was essential to his defense.'" *Id.*, 1994 OK CR 40, ¶ 12, 876 P.2d at 695, quoting *Rea v. State,* 1909 OK CR 160, 105 P. 386. This is simply not a case where the doctrine of transferred intent applies.

> Under the doctrine of transferred intent when one person acts with intent to harm another person, but because of a bad aim he instead harms a third person who he did not intend to harm, the law considers him just as guilty as if he had actually harmed the intended victim.

Short, 1999 OK CR 15, ¶ 44, 980 P.2d at 1098 citing W. LaFave and A. Scott, *Criminal Law*, § 3.12(d) (2nd ed.1986). There was not any evidence at trial that Appellant had aimed the shotgun at Bryan but missed and instead killed Mitchell. Instead, the evidence suggested that Appellant suffered a mistake of fact as to the victim's identity. *See* 21 O.S.2011, § 152 (5) (setting forth the defense of mistake of fact disproving criminal intent). The transferred intent or unintended victim doctrine is to be distinguished from the mistaken identity situation. 1 Wayne R. LaFave, *Substantive Criminal Law,* § 6.4(d) (3d ed.) (Westlaw 2017).

> The situation [ ] concerning the unintended victim of an intentional crime – which we have referred to for short as the bad-aim situation – is to be distinguished from an entirely different unintended-victim case – the mistaken-identity situation – which is governed by a quite separate set of legal rules. Thus in the semi-darkness A shoots, with intent to kill, at a vague form he supposes to be his enemy B but who is actually another person C; his well-aimed bullet kills C. Here too A is guilty of murdering C, to the same extent he would have been guilty of murdering B had he made no mistake. A intended to kill the person at whom he aimed, so there is even less difficulty in holding him guilty than in the bad-aim situation. And of course A's conceivable argument that his mistake of fact (as to the victim's identity) somehow negatives his guilt of murder would be unavailing: his mistake does not negative his intent to kill; and on the facts as he supposes them to be A is just as guilty of murder as he is on the facts which actually exist.

Id., (footnotes omitted). 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(d), at 48 (2d ed. 2003).

¶23 Although Appellant may have believed that Bryan was behind the wheel of the Grand Am, all of the evidence at trial suggested that he intended to kill the driver of the vehicle. Appellant admitted that he knew his weapon well and practiced with it regularly. The evolving string of lies which he told Detective Ritter further evinced Appellant's intent to kill the driver of the Grand Am. Therefore, the error in the instruction did not affect Appellant's substantial rights and we conclude that plain error did not occur.

¶24 Even if we were to find that the challenged instruction constituted plain error, we would find that this error was harmless. *Turrentine v. State,* 1998 OK CR 33, ¶ 21, 965 P.2d 955, 967 (finding that erroneous instruction on transferred intent subject to harmless error analysis). Appellant has not shown that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or otherwise represented a miscarriage of justice. The trial court properly instructed the jury concerning the requisite elements of first degree malice murder. *See* Instruction Number 4-61, OUJI-CR(2d) (Supp.1997). The State proved beyond a reasonable doubt that Appellant had intended to kill Thomas Bryan. As opposed to the multitudes of cases which come before this Court without any direct evidence of intent, the record in the present contains Appellant's explicit expression of his intent to take Bryan's life. Lori Mangels testified that Appellant showed her his shotgun and threatened to blow Bryan's head off the next time that he saw him. Appellant's actions thereafter wholly conformed to this stated intent when he shot Mitchell. Based upon the overwhelming evidence of Appellant's guilt we find that the error in the instruction was harmless beyond a reasonable doubt. *See Burgess v. State*, 2010 OK CR 25, ¶ 21, 243 P.3d 461, 465 (finding error which relieved State of burden of proving all of the essential elements of the offense harmless beyond a reasonable doubt). Proposition One is denied.

¶25 In his second proposition of error, Appellant contends that prosecutorial misconduct deprived him of a fair trial. This Court's review

is well established. "Prosecutorial comments, like jury instructions, are not reviewed in artificial isolation, but must be judged in the context of the entire record. Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such as to deprive the defendant of a fair trial." *Ashton v. State*, 2017 OK CR 15, ¶ 38, 400 P.3d 887, 897 (quotations and citations omitted).

¶26 Appellant concedes that he failed to object to the prosecutor's comments at trial. Therefore, we find that he has waived appellate review of his claims for all but plain error and review them pursuant to the test set forth in *Simpson* to determine whether Appellant has shown an actual error, which is plain or obvious, and which affected his substantial rights. *Malone v State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

¶27 Reviewing the record, we find that Appellant has not shown the existence of an actual error. Appellant asserts that the prosecutor made a misstatement of law during closing argument. This Court has clearly explained that prosecutors should not misstate the law to the jury. *Ashton,* 2017 OK CR 15, ¶ 52, 400 P.3d at 900. The record shows that the prosecutor informed the jury in the present case that:

> Life with the possibility of parole means 45 years. Forty-Five years is the determination because the State determined many years ago that somebody sentenced to life has the right to ask for parole at some point, so they had to attach a number to it. Life in the State of Oklahoma means 45, which means that you are eligible for consideration of parole after 38 years and three months.

Appellant argues that the prosecutor's comments violated the rule announced in *Florez v. State,* 2010 OK CR 21, 239 P.3d 156, and *Taylor v. State*, 2011 OK CR 8, 248 P.3d 362.

¶28 In *Florez*, this Court held that a prosecutor's description of the 85% Rule was a misstatement of law. *Florez*, 2010 OK CR 21, ¶¶ 5-6, 239 P.3d at 158. The prosecutor, in *Florez,* argued:

> And you're also given an instruction that tells you he will only do 85 percent of what you give him. He's not going to do all of it. So you've got to take that into consideration. He's only going to do 85 percent of it.

Id., 2010 OK CR 21, ¶ 5, 239 P.3d at 158. We found that this constituted a misstatement of law because nothing in either 21 O.S.Supp.2007, § 13.1 or the standard criminal jury instruction supported the inference that the defendant would be freed before he served the full term of any sentence imposed. *Id.*, 2010 OK CR 21, ¶ 6, 239 P.3d at 158. The correct statement of law would have been that the defendant "would have to serve 85% of his sentence before becoming eligible for parole." *Id.*, 2010 OK CR 21, ¶ 7, 239 P.3d at 158.

¶29 In *Taylor,* this Court found that the prosecutor had likewise misstated the law during closing argument when he argued:

> It's probably not a shocker to you people that you don't serve your entire sentence. These instructions lay out for you the ground rules. 85 percent of life, which is equated to 45 years. The Department of Corrections decided 45 years is what a life sentence is. You serve 85 percent of that, which comes out to thirty eight years and three months or something. It's in here and it explains to you how that works. Both of these crimes are considered, under the law, to be 85 percent instructions and that's Instruction 31 and 33.

Taylor, 2011 OK CR 8, ¶ 48, 248 P.3d at 377. We found that the prosecutor's assertion that a criminal defendant does not serve his entire sentence but only serves thirty eight years and three months was contrary to the statutory reality. *Id.*, 2011 OK CR 8, ¶ 51, 248 P.3d at 378.

¶30 Applying *Florez* and *Taylor* to the present case, we conclude that the prosecutor's comments in the present case were borderline. He did not state that Appellant would be freed before he served the full term of any sentence imposed as found improper in *Florez* and *Taylor.* However, he inartfully described a sentence of life with the possibility of parole as 45 years while explaining that Appellant would have to serve 85% of his sentence before becoming eligible for parole. Life imprisonment is just that. It is not limited to a term of years.[8] *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-283. The only time that a life sentence is calculated at 45 years is when the Oklahoma Department of Corrections determines an inmate's eligibility for parole. *Id.* If a criminal defendant is not

granted parole, he or she will serve the remainder of his or her natural life while serving a life sentence in Oklahoma. Since the prosecutor's comment was consistent with the requirement within 21 O.S.Supp.2015, § 13.1 that a defendant convicted of first degree murder must serve 85% of his sentence we find that the prosecutor did not misstate the law.

¶31 Reviewing the entire record in the present case, the cumulative effect of the prosecutor's comments did not deprive Appellant of a fair trial. *Malone*, 2013 OK CR 1, ¶ 43, 293 P.3d at 212. Thus, we find that prosecutorial misconduct did not deprive Appellant of a fundamentally fair trial. Proposition Two is denied.

¶32 In his third proposition of error, Appellant challenges defense counsel's effectiveness. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Ashton v. State*, 2017 OK CR 15, ¶ 55, 400 P.3d 887, 900. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Id.*

¶33 The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Appellant must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.*, 466 U.S. at 689-90, 104 S.Ct. at 2065-66.

¶34 Appellant, first, argues that defense counsel's comments concerning the 85% Rule in closing argument constituted ineffective assistance. Defense counsel made a comment similar to the statement which the prosecutor had made. She stated:

> There are two pieces of paper that are in your instruction packet that I think are ultimately very important in this state. The first one is Instruction Number 50 and it explains exactly what the State just told you, that life is 45 years, that at 85 percent that's 38 years and three months. Let me be very clear, it's not an automatic bounce. That's just your first attempt at parole and even if it's granted, it doesn't mean you're getting out. Most likely those sentences on an 85 percent will do almost all of the time. Life is 45 years. Like I said, Marcus will be 67 when he reaches just the parole point for the first opportunity. He will be in his seventies when he's served the full 45.

The majority of defense counsel's argument accurately stated the law as to the 85% Rule and parole eligibility. Counsel effectively conveyed to the jurors that parole was not at all guaranteed and the odds were that Appellant would serve his sentence in its entirety. However, defense counsel compounded the prosecutor's inartful comment when she equated serving a life sentence in full through service of 45 years.

¶35 Since adopting Instruction Number 10-13B, OUJI-CR(2d)(Supp.2006), this Court has repeatedly had to address the issue of practicing attorneys misapprehending what constitutes a life sentence. As imprisonment for life is self-descriptive, we can only conclude that the instruction is somehow confusing trial court practitioners during the throes of trial.[9] Accordingly, we find that the instruction should be modified as set forth below:

> A person convicted of **[Specify Crime in 21 O.S. Supp. 2015, § 13.1]** shall be required to serve not less than eighty-five percent (85%) of the sentence imposed before becoming eligible for consideration for parole and shall not be eligible for any credits that will reduce the length of imprisonment to less than eighty-five percent (85%) of the sentence imposed.
>
> If a person is sentenced to life imprisonment, the calculation of eligibility for parole is based upon a term of forty-five (45) years, so that a person would be eligible for consideration for parole after thirty eight (38) years and three (3) months. However, if a person is not granted parole, he or she will be imprisoned for the remainder of his or her natural life while serving a sentence of life imprisonment.

Although there is no need to further define what constitutes a life sentence, the additional sentence within this instruction may help trial attorneys to maintain their course as they balance the many nuances of jury trial. *See Skinner v. State*, 2009 OK CR 19, ¶ 41, 210 P.3d 840, 855

(finding no error in trial court's refusal to instruct jury regarding meaning of a life sentence); *Fairchild v. State*, 1999 OK CR 49, ¶ 90, 998 P.2d 611, 629 (affirming trial court's refusal to instruct on meaning of life sentence and meaning of sentence of life without possibility of parole).

¶36 In the present case, we must determine whether counsel's performance prejudiced the defense. *See Ashton*, 2017 OK CR 15, ¶ 57, 400 P.3d at 901 ("When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed."). To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

¶37 Reviewing the record, we find that Appellant has not shown that there is a reasonable probability that the outcome of the trial would have been different had counsel not equated a life sentence with service of 45 years. The evidence at trial strongly supported the jury's determination that Appellant should be imprisoned for life without the possibility of parole. Appellant brazenly threatened to blow Thomas Bryan's head off and continued to follow through on this threat until he shot Bryan's companion, Leland Mitchell, through the forehead. Despite admitting that he was safe at his own home and had time to cool off from the initial confrontation, Appellant continued to pursue Bryan and attempt to kill him. Mitchell was wholly uninvolved in the circumstances and was simply a guest in Bryan's home. Appellant's act of murdering Mitchell occurred after his former conviction of a felony. Based upon the facts of this case, we find that defense counsel's comment did not prejudice Appellant's defense. Therefore, we find that Appellant has not shown that he was denied the effective assistance of counsel.

¶38 Second, Appellant argues that defense counsel was ineffective for failing to object to the instruction he challenges in Proposition One. We determined in that Proposition that Appellant had not shown that plain and reversible error had occurred. As such, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's failure to raise the challenge now raised on appeal. *Ashton*, 2017 OK CR 15, ¶¶ 58-59, 400 P.3d at 901; *Glossip v. State,* 2007 OK CR 12, ¶¶ 110-12, 157 P.3d 143, 161.

¶39 As Appellant has failed to establish ineffective assistance of counsel under *Strickland,* we find that no relief is required. Proposition Three is denied.

¶40 In his fourth proposition of error, Appellant contends that the trial court should have suppressed the recording of his in custody admissions to Detective Ritter. He argues that his waiver of rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) was not knowing because he had not taken his prescribed mental health medication that day and was suffering from the effects of schizophrenia during the interview. Appellant filed a pretrial motion seeking to suppress his statements to Detective Ritter based upon these grounds. The trial court held a hearing pursuant to *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), heard Detective Ritter's testimony and watched the recording of Ritter's interrogation of Appellant. The trial court determined that Appellant had knowingly and voluntarily waived his rights under *Miranda*. The question of the voluntariness of Appellant's admissions was a fact question to be resolved by the jury and the trial court instructed the jury accordingly.

¶41 This Court reviews the trial court's denial of a motion to suppress for an abuse of discretion. *Sanders v. State,* 2015 OK CR 11, ¶ 17, 358 P.3d 280, 285. This is the same standard of review applied to both a trial court's ruling from a *Jackson v. Denno* hearing and a trial court's decision to admit evidence at trial. *Davis v. State*, 2011 OK CR 29, ¶ 156, 268 P.3d 86, 125; *Davis v. State*, 2004 OK CR 36, ¶ 34, 103 P.3d 70, 80. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

¶42 Applying this standard to the present case, we find that the trial court did not abuse its discretion. A person may waive the rights set out in *Miranda* "'provided the waiver is made voluntarily, knowingly and intelligently.'" *Moran v.*

Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1140–41, 89 L.Ed.2d 410 (1986), quoting *Miranda*, 384 U.S. at 444, 475, 86 S.Ct. at 1612, 1628.

> The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id., (quotations and citations omitted). As Appellant does not challenge the voluntariness of either his waiver or his statements to the officers, we review the totality of the circumstances to determine whether he understood the rights at stake and the consequences of waiving them. *Webster v. State*, 2011 OK CR 14, ¶ 59, 252 P.3d 259, 276;

¶43 Detective Ritter testified that he interviewed Appellant in an interview room at the Detective Division with Detective Frazier. Ritter stated that he gave Appellant what is commonly known as the *Miranda* warning and advised him of his rights prior to having a substantive conversation with him. Appellant indicated that he understood each of the rights, waived them, and agreed to speak with the officers.

¶44 Ritter further testified that Appellant disclosed during the interview that he had mental health issues and had not taken his medication the preceding day but Ritter continued with the interview because Appellant was communicative and seemed fine. Ritter advised that Appellant appeared to understand where he was at and what was going on. Based upon his experience and training, Ritter did not believe that Appellant was under the influence of drugs or alcohol. Appellant responded appropriately to Ritter's questions.

¶45 The Rights Waiver form that Ritter used to advise Appellant of his rights is also within the record on appeal. The form accurately sets forth the rights announced in *Miranda*. Appellant's initials are next to each of the listed rights and his signature is affixed under the declaration: "I have read and understood my rights. I am willing to answer questions and understand that I may stop answering questions at any time."

¶46 The recording of the interview corroborated Ritter's testimony. The recording contains both an audio and visual account of the interrogation. Detective Ritter and Detective Frazier interviewed Appellant around 5:45 a.m. on December 16, 2015. Appellant appeared alert and attentive throughout the interview. Ritter first ascertained that Appellant could read, write, and understand his questions. Appellant advised Ritter that he was not under the influence of drugs or alcohol. He had last smoked marijuana approximately twelve hours earlier. Appellant indicated that he could read and write. He further affirmed that he understood Ritter. When Ritter read Appellant his *Miranda* rights from the Rights Waiver form Appellant actively read along with the detective and acknowledged that he understood each of the rights. He eagerly expressed his desire to speak with the officers and signed the Rights Waiver form.

¶47 Appellant admitted driving the green Saturn but wholly denied any knowledge of a confrontation with Thomas Bryan or anyone else that day. He denied speeding in his car and disallowed that a guy on a motorcycle had come up to him complaining about his driving. Even after Ritter confronted Appellant with the fact that his fifteen year old brother had confirmed that the confrontation had occurred, Appellant continued to deny any memory of such an encounter. Eventually, he asked Ritter to allow him to think and after rubbing his temples for several minutes admitted that such a confrontation had occurred. Appellant complained that Bryan had called him the N-word but related that he had gone back to his home and played video games afterward. Appellant further admitted that he spoke to Lori Mangel but claimed that he had told her that everything was cool. In an apparent attempt to further confront Appellant, Ritter asked Appellant if he had mental health issues. Appellant indicated, "A little bit" and asserted that he had Schizophrenia, Bipolar, OCD, and ADHD. Appellant advised that he was on medication through a local clinic but very confidently stated that he regularly took his medication. When Ritter asked if Appellant had taken his medication that day, Appellant indicated that

he had not. However, he confidently asserted that he had taken it the day before. Ritter continued to interview Appellant without any incident or problem.

¶48 It is truly questionable whether Appellant actually has mental health issues. Forensic Psychologist, Dr. Peter Rausch, of the Oklahoma Forensic Center evaluated Appellant during the competency proceedings held in the case before trial. Appellant asserted that he had Schizophrenia, Bipolar, and ADHD but could not relate any symptoms associated with these conditions. Dr. Rausch did not observe any legitimate signs of mental illness, cognitive impairment, or neurological disease while evaluating Appellant. Instead, Dr. Rausch indicated that Appellant tested excessively high above the cut score for malingering strongly suggesting that he was feigning the symptoms of mental illness. Based upon Rausch's report, Appellant was found competent to stand trial.

¶49 Nothing in the record suggests that Appellant's mental health status prevented him from understanding the rights at stake and the consequences of waiving them. Appellant was communicative and appeared fine. He responded appropriately to Ritter's questions but simply refused to confess his involvement in Mitchell's death until confronted with the cold hard reality of the circumstances. Appellant appeared wholly goal oriented. After he confessed Appellant openly admitted that he had initially "lied" to Ritter but asserted that he was just trying to scare Bryan. All of Appellant's statements and actions on the recording suggest that he understood the rights at stake and the consequences of waiving them.

¶50 Based upon this record, we must conclude that the trial court's determination that Appellant knowingly waived his rights under *Miranda* was not clearly against the weight and effect of the facts presented. Proposition Four is denied.

¶51 In his fifth proposition of error, Appellant claims the combined errors in his trial denied him the right to a constitutionally guaranteed fair trial. When there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561. However, a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by the appellant. *Engles v. State*, 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315; *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. We have not identified any error during the course of the trial in the present case. Therefore, no new trial or modification of sentence is warranted and this assignment of error is denied.

DECISION

¶52 The Judgment and Sentence of the District Court is hereby **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY
THE HONORABLE DOUG DRUMMOND,
DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: LUMPKIN, P.J.
LEWIS, V.P.J.: Specially Concur
HUDSON, J.: Concur
KUEHN, J.: Dissent
ROWLAND, J.: Concur

LEWIS, VICE PRESIDING JUDGE, SPECIALLY CONCURS:

¶1 Both the Opinion of the Court and the special writing by Judge Kuehn are well researched and written. I, however, write specially to point out that the issue presented in proposition one is not as complicated as it seems.

¶2 Appellant simply complains that the trial court's transferred intent instruction reduced the intent element of first degree murder from malice aforethought (a deliberate intent to take the life of a human being) to intent to injure or assault by including injure and assault in the first line of the instruction. Appellant argues, therefore, that he may have been convicted of first degree murder without the jury finding that he caused the death of the victim with malice aforethought.

¶3 His argument is based on the premise that, in his interpretation, the instruction could have been read, in abstract, to mean if a defendant intends to injure "A" and by mistake or accident kills "B" the element of intent is satisfied even though the defendant did not intend to kill "B." In such case the intent to injure is transferred from "A" to "B."

¶4 Our review of this alleged instructional error is limited to a review of plain error only as Appellant failed to object to the instruction given. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (holding that a failure to object to instructions forfeits review unless the appellant can show plain error).

¶5 I believe that Appellant's argument has merit and the instruction given constitutes error, as the instruction given could be construed to read that an intent to injure "A" might be transferred to an intent to kill "B." The Oklahoma uniform instruction was not the best choice for the facts in this case, and the trial court did not remedy the confusion by leaving injure and assault options in the instruction.[1]

¶6 Trial courts should be reminded to omit words within brackets in instructions which do not apply to the facts of a particular case. In this case, the State did not allege any intent to injure or assault with reference to the malice murder count and transferred intent was not applicable to the assault with a dangerous weapon count. I am, however, confident that the instruction did not cause any harm to Appellant in this case.

¶7 The jury was fully instructed on the elements of first degree malice murder and the requisite definitions of those elements. The jury was also instructed on the elements of the lesser offense of second degree depraved mind murder. First degree malice murder requires specific intent and second degree depraved mind murder does not. The transferred intent doctrine applies to specific intent crimes against the person. It would have been impossible for the transferred intent instruction to cause the jury to convict Appellant of first degree murder if he were actually guilty of second degree murder. I agree, therefore, that the instruction given was harmless.

¶8 I believe this Court agrees that Oklahoma's first degree murder statute only requires that a defendant cause a death of another with malice aforethought (the intent "to take away the life of a human being"). 21 O.S.2011, § 701.7(A). When a person acts with this intent and causes the death of another, the person is guilty of first degree malice murder. Under a clear reading of the statute, it is of no consequence whether a defendant intended to kill one specific individual but killed someone else by mistake or accident.

¶9 Evidence was overwhelming that Appellant actually intended to kill the person at whom he discharged his shotgun. Therefore, his intent to kill the person killed was not legally transferred from an intended victim to the actual victim. This Court has not expanded the transferred intent doctrine to a situation where a defendant hurls a blow at an intended victim thinking that victim is someone else, *i.e.* "bad eyesight" which sounds similar to a "bad aim." Public policy dictates, however, that a defendant not avail himself of a defense based on either "bad eyesight" or "bad aim" in malice murder cases.[2] One method of upholding that public policy is to utilize the doctrine of transferred intent to prevent a defendant from claiming that the person killed was not the intended victim. In conclusion, I, too, would affirm the Judgments and Sentences in this case.

KUEHN, J., DISSENTING:

¶1 I dissent to the analysis of Proposition I, and to the conclusion that the comments on the 85% Rule, complained of in Proposition II, were harmless beyond a reasonable doubt. I believe the trial court's instruction on "transferred intent" was a correct statement of the law and appropriate in this circumstance. I believe the attorneys' misstatements of the 85% Rule could have affected the jury's sentence recommendation, and would affirm the conviction but remand for resentencing.

¶2 Appellant was convicted in Count 1 of intentionally killing Mitchell, the friend of Appellant's neighbor, Bryan, by intentionally

firing a shotgun into a vehicle Mitchell was driving.[1] Appellant eventually admitted to police that he shot in the direction of the car Mitchell was driving (he actually fired more than once, and hit Mitchell in the center of the forehead from a distance of about 120 yards). The shooting occurred at night, such that it would have been difficult for Appellant to see inside the car. Although the trial court noted that Appellant's various explanations of what happened were not consistent, it nevertheless included instructions on self-defense, and on depraved-mind murder as a lesser related offense. Rejecting these options, the jury concluded that Appellant fired his weapon into Mitchell's vehicle with an intent to kill.

¶3 The trial court instructed the jury on the concept of "transferred intent," OUJI-CR (2nd) No. 4-11 (Instruction No. 20). Neither party objected to this instruction. In fact, both parties discussed the implications of the instruction in closing argument. The State never claimed Appellant intended to kill *Mitchell*. Appellant was angry with his neighbor, Bryan, not Mitchell, and there was no evidence he intended to harm Mitchell. The prosecutor explained that under the doctrine of transferred intent, the fact that Appellant killed someone other than his intended victim did not excuse his conduct. Based on Appellant's conflicting accounts, defense counsel advanced a mixture of self-defense and accident, claiming Appellant was in reasonable fear of his life, but that he only meant to scare Bryan. Defense counsel claimed that because Appellant had a legal right to use deadly force to protect himself, killing Mitchell was an unfortunate accident that was excusable under the law.

¶4 In Proposition I, Appellant objects for the first time to the wording of Instruction 20. He concedes a transferred-intent instruction was appropriate, but claims the court's failure to properly edit the wording of the Uniform Instruction to fit these particular facts prejudiced him. Specifically he claims the instruction relieved the State of its duty to prove *any* intent to kill on his part. In Proposition III, he faults trial counsel for not recognizing this textual flaw.

¶5 The Majority's conclusion that the instruction was not warranted in this case is both incorrect and irrelevant. I appreciate the distinction between two classic fact patterns: one where the defendant accidentally kills someone other than his intended victim (the "bad aim" scenario), the other where he kills someone he mistakenly believes is his intended victim (the "mistake of fact" scenario). But however one labels these scenarios, the fact remains that *neither of them* excuses the defendant's conduct under Oklahoma law.

¶6 To prove premeditated murder, the State must establish the unlawful killing of another human with malice, and malice is the "deliberate intention unlawfully to take away the life of a human being." 21 O.S.Supp.2012, § 701.7(A); *see also* OUJI (2nd) No. 4-61. *There is no requirement that the defendant's malice be directed at the person who was killed. Jackson v. State,* 2016 OK CR 5, ¶ 8, 371 P.3d 1120, 1122. That point may seem obvious to lawyers, but it may not be so obvious to the layman. Hence an instruction on the concept may be entirely appropriate in cases like this where a third party is inadvertently harmed, and it is appropriate *regardless* of whether the third party's harm was due to "bad aim" (accident) or "mistake of fact" (mistake). Over a century ago, this Court recognized the technical distinction between the two scenarios, but found no legal difference in the result. *Fooshee v. State*, 1910 OK CR 86, 3 Okl.Cr. 666, 108 P. 554, 560.[2] What's more, OUJI-CR (2nd) No. 4-11 encompasses *both* scenarios, and reaches the same result regardless of whether the victim was harmed by "mistake" or "accident" OUJI-CR (2nd) No. 4-11.[3]

¶7 Even if the Majority were correct that the instruction was unwarranted here, the fact remains, the jury received it. The real issues are whether the instruction stated the applicable law, and if not, whether it renders the jury's verdict unreliable. I believe the instruction was appropriate to these facts and correctly stated the law. In fact, the trial court's editing made the instruction a more correct statement of the law (as applied to these facts) than the text of the Uniform Instruction itself. Uniform Instruction No. 4-11 contains alternatives to be selected based on what the defendant sought to do (assault, battery, or homicide), and the fate of the person mistakenly or accidentally harmed:

> If you find that the defendant intended to **kill/ injure/assault** [Name of Intended Victim], and by mistake or accident **injured/ assaulted** [Name of Actual Victim], the element of intent is satisfied even though the defendant did not intend to **kill/ injure/ assault** [Name of Actual Victim]. In such a

case, the law regards the intent as transferred from the original intended victim to the actual victim.

Id. The trial court altered the text to account for the fact that Mitchell was *killed* rather than injured, but left alternatives for Appellant's original intentions:

> If you find that the defendant intended to ***kill/ injure/ assault*** THOMAS BRYAN, and by mistake or accident **killed** LELAND MITCHELL, the element of intent is satisfied even though the defendant did not intend to **kill** LELAND MITCHELL. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

¶8 Appellant complains that the trial court left all three intent options in the first line of the text, but this was entirely proper under the facts.[4] While the State of course alleged that Appellant intended to kill Bryan, Appellant's statements to police disputed that claim; he insisted that he only meant to scare Bryan. In any event, the instruction as edited by the trial court certainly *did not* absolve the State from proving any criminal intent on Appellant's part, as he now claims. The first words of the instruction – "*If you find that the defendant intended to*..." – speak for themselves. The instruction merely states this: Whatever the jury may believe Appellant was endeavoring to do to Bryan (scare him, kill him), his culpability is not mitigated ("*is satisfied even though*") the person ultimately harmed by his conduct was someone else. That certainly comports with the law of this State.[5] Appellant's jury was properly instructed on the elements of premeditated murder and self-defense. Instruction No. 20 supplemented those instructions, but did not distort or contradict them. I find no reasonable probability that Instruction No. 20, as edited, could have contributed to an unreliable verdict, and no reason to fault trial counsel for not objecting to its wording.[6]

¶9 As to Proposition II, both the prosecutor and defense counsel repeatedly told the jury that "life means 45 years." Their explanations were at best unclear and at worst misstatements of the law. The prosecutor contrasted a life-without-parole sentence – one where "you never get out," "that will be it," "he will never leave the penitentiary" – with a straight life sentence, which "means 45 years." Defense counsel's own closing comments were just as misleading. She told the jury, "Most likely those sentence[d] on an 85% crime will do almost all of the time. Life is 45 years." Defense counsel concluded by asking the jury to impose a life sentence for murder, because "*45 years is a life* and that is the appropriate punishment for this crime." These comments can be construed as saying that a life sentence is, for *all* purposes, automatically transformed into a sentence of 45 years – and that even if the defendant does not receive parole after 85% of that term, he *will* be released in 45 years.[7] The Majority is uncomfortable enough to suggest amending the applicable OUJI instruction, and I wholeheartedly agree with that proposal. But I am not confident that the comments by both attorneys here did not influence the jurors' understanding of the law and recommendation on sentence. Appellant's crime was reprehensible, and the results were tragic, but I would remand this case for resentencing.

LUMPKIN, PRESIDING JUDGE

1. The State charged Appellant in Count 2 with Shooting with Intent to Kill (21 O.S.2011, § 652(A)) but the jury found him guilty of the lesser offense of Assault with a Dangerous Weapon.

2. Appellant is required to serve not less than 85% of his sentence prior to becoming eligible for consideration for parole. 21 O.S.Supp. 2015, § 13.1.

3. Tr. 369.

4. Tr. 533.

5. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

6. State's Exhibit Number 66.

7. State's Exhibit Number 66.

8. Lawyers continue to confuse the punishment set out in our statutes with the administrative rules of the Pardon and Parole Board. Under our penal statutes, a life sentence means the natural life of the offender. The fact that the Pardon and Parole Board has arbitrarily set forty-five (45) years as the number the Board will use to comply with the "Forgotten Man Act", 57 O.S.Supp.2013 § 332.7, does not affect the actual sentence; that number affects only when the Board will consider the inmate for purposes of parole.

9. Despite our opinions in *Florez* and *Taylor,* this Court has continued to be presented with cases wherein practicing attorneys misstate the effects of the 85% Rule on a life sentence. *See Bramlett v. State*, 2018 OK CR 19, ¶ 40, ___ P.3d ___ (finding prosecutor misstated the law when he declared that defendant would only serve 38 years on a life sentence); *Lee v. State*, 2018 OK CR 14, ¶ 10, ___ P.3d ___ ("Telling the jury that a life sentence is forty-five (45) years in prison is a misstatement of the law.").

LEWIS, V.P.J.

1. I would encourage the committee on uniform criminal jury instructions to examine the current Oklahoma Criminal Instruction on transferred intent. Other Courts have used similar, but different language to convey the same doctrine. A cursory search reveals the following:

> If you find that [the defendant] intended to [assault/injure/kill] a person other than [victim] and by mistake or accident [assaulted/injured/killed] [victim] the element of intent is satisfied, even though [the defendant] did not intend to [assault/injure/kill] [victim]. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

See Nebraska v. Moore, 740 N.W.2d 52, 56 (Neb.App.2007), *affirmed on other grounds in Nebraska v. Moore,* 751 N.W.2d 631 (Neb.2008). Also:

> When one intends to kill or injure a certain person, and by mistake or accident kills a different person, the crime, if any, is the

same as though the original intended victim had been killed. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

See Uniform Jury Instruction-Criminal 14-255 *New Mexico Rules Annotated* (NMRA) 1999.

2. Also, a defendant should neither avail himself of a defense nor receive a discount when his well-aimed shot kills the intended victim and also kills another person.

KEUHN, J.

1. In Count 2, Appellant was charged with Shooting with Intent to Kill based on a prior incident where he shot at Bryan; the jury convicted him of Assault with a Dangerous Weapon as a lesser alternative. That count is not affected by this analysis.

2. By the express terms of our statute the unlawful killing of a human being, committed with a premeditated design to effect his death, or with a premeditated design to effect the death of any other person, is murder. Certainly this definition will cover a case where one person unlawfully assaults another with a premeditated design to kill him, and in the affray kills a third person. *But it is not limited in its application to that character of case alone. Suppose that A. in the nighttime lies in wait for the purpose of killing B. as the latter passes by; C. comes along, and A., mistaking him in the darkness for B. shoots C. and kills him, but with the premeditated design to kill B. Would not that be murder?* And yet no assault was committed upon B.; he may have been miles away. *It is true that in such case an indictment charging the homicide to have been committed with a premeditated design to kill C. would be good,* and under the doctrine of implied malice would be sustained by proof of the actual facts. *But if the prosecution knew the facts and alleged them – A.'s actual and premeditated design to kill B., and his assault upon and slaying of C. with such premeditated design to kill B. – would any one say that such indictment was not good, and that proof of the facts thus alleged would not support a conviction?* ... And an indictment which charges the shooting and killing of the deceased, and alleges that the same was done without authority of law, and with a premeditated design to kill *another person*, naming him, *fulfills the requirements of the statute*; and, if those allegations are sustained by the proof, a conviction thereunder must stand.

Fooshee, 1910 OK CR 86, 3 Okl.Cr. 666, 108 P. 554, 560 (emphasis added).

3. One esteemed legal commentator believes the notion that a defendant's intent is "transferred" from the intended victim to the accidental victim is a solution in search of a problem – it may be relevant in tort, but "has no proper place in criminal law," where it is "a misleading half-truth, often given as an improper reason for a correct result, but incapable of strict application." Perkins, *Criminal Law* (2d ed. 1969) at 822. With regard to malice murder, Perkins believes there is no need to resort to the concept unless, for some reason, the jurisdiction requires that the defendant's intent to kill be directed at the person killed. *Id.* at 827. Perkins also recognizes the "mistake of fact" cases as falling in the same general category:

> In case of an attack made upon the wrong person as a result of mistaken identity, needless to say, the law will recognize that the assailant "meant to murder the man at whom he shot" although he had in mind the name of another man who was not there.

Id. The Majority's reference to Professor LaFave on the subject is in complete accord:

> [The defendant's] conceivable argument that his mistake of fact (as to the victim's identity) somehow negatives his guilt of murder would be unavailing: his mistake does not negative his intent to kill; and on the facts as he supposes them to be [he] is just as guilty of murder as he is on the facts which really exist.

LaFave, *Substantive Criminal Law* § 6.4(d) at 48 (3rd ed. 2017).

4. A glaring problem with the Uniform Instruction is that it does not contemplate the situation where – as here – the unintended victim dies. This may be because the Instruction is placed in the chapter on Assault and Battery, not Homicide. The trial court here wisely and correctly edited the instruction to account for the fact that Mitchell was killed, not injured or assaulted, by mistake or accident. The Instruction should be amended to include the situation where the victim dies, or a similar Instruction covering that scenario should be included in the chapter on homicides.

5. Of course I also disagree with the Majority's conclusion (Slip Op. at 9) that the instruction was error because it "permitted the jury to find that Appellant had the intent to kill Mitchell based on a pre-existing intent to injure or assault Bryan." The State *never claimed* Appellant had any intent to kill *Mitchell*; our law does not require it, and the instruction does not suggest it.

6. *See Short v. State*, 1999 OK CR 15, ¶ 46, 980 P.2d 1081, 1099 (in malice murder prosecution, where the victim was someone other than those the defendant sought to harm, jury instruction explaining that "the intent to kill as to one person is sufficient to convict as to another person actually harmed" did not absolve the State of its burden of proof).

7. For example, the prosecutor told the jury, "Life in the State of Oklahoma means 45, which means that you are eligible for parole after 38 years and three months." The first clause is a patent misstatement of the law, even if the second one is technically correct. The Majority finds no harm because these were 85% crimes, but that is not the problem here. The Uniform Instruction on the 85% Rule is a correct statement as far as it goes, but still leaves room for jurors (and attorneys) to conclude that "life means 45 years" is a rule all its own. Telling a jury that the defendant *will* be released after 85% of his sentence (the *Florez* situation) is a different error from suggesting that *regardless of parole*, a life sentence equals 45 years.

2018 OK CR 30

KEITH BERNARD MACK, Appellant, vs. THE STATE OF OKLAHOMA, Appellee.

No. F-2017-422. August 16, 2018

OPINION

KUEHN, JUDGE:

¶1 Keith Bernard Mack was tried by jury and convicted of First Degree Murder in violation of 21 O.S.2011, § 701.7(A), in the District Court of Tulsa County, Case No. CF-2014-1754. In accordance with the jury's recommendation the Honorable James M. Caputo sentenced Mack to life imprisonment without the possibility of parole. Mack appeals from this conviction and sentence, and raises four propositions of error in support of his appeal.

¶2 During the late afternoon on April 17, 2014, Appellant fatally shot Keondrea Love in the head. Before the crime, Appellant and Love met by chance at an informal convenience store, the Candy Lady's, near their apartment complex. Appellant had a .38 revolver, which he habitually carried. Love was unarmed. Appellant and Love began to argue about the price of haircuts they had given one another. As they walked through the complex the argument escalated, and Appellant shot Love just above his left ear; the bullet exited just above the right ear, slightly in front of the entry wound. Appellant later claimed he thought Love had a gun. The encounter was captured on surveillance video. The video showed Love walking, looking ahead, while Appellant walked about three feet behind him with his left arm fully extended. Love fell, and Appellant brought his arm down and ran away.

¶3 In Proposition I Appellant claims the State failed to prove beyond a reasonable doubt that he did not act in self-defense. A person may use deadly force in self-defense if a reasonable

person in his circumstances and from his viewpoint would reasonably have believed he was in imminent danger of death or great bodily harm. *Davis v. State*, 2011 OK CR 29, ¶ 95, 268 P.3d 86, 114-15. An aggressor, or a person who voluntarily enters a situation armed, cannot claim self-defense. *Id.* Once a defendant raises self-defense, the State must overcome the defense beyond a reasonable doubt. *Robinson v. State*, 2011 OK CR 15, ¶ 17, 255 P.3d 425, 432. Through video and an eyewitness account, the State showed that after an argument Appellant, armed with a revolver, followed Love and shot him in the head from behind. Appellant claimed that Love threatened him; he believed Love was armed, and he shot when he thought Love was about to turn and pull a weapon. He argued that this story was supported by the location and trajectory of the wound. On appeal, Appellant essentially repeats these claims, asking this Court to substitute its judgment for that of the jury. We will not do so. Jurors heard the conflicting evidence, and concluded Appellant was not acting in self-defense. We presume jurors resolve conflicts in favor of the prosecution. *Id.* Sufficient evidence supports the jury's conclusion that the State proved beyond a reasonable doubt that Appellant did not act in self-defense. *Id.* Taking the evidence in the light most favorable to the State, any rational juror could find beyond a reasonable doubt that Appellant did not act in self-defense, and committed first degree murder. *Easlick v. State,* 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. This proposition is denied.

¶4 In Proposition II Appellant claims the trial court should have *sua sponte* instructed jurors on imperfect self-defense. At Appellant's request, jurors were properly instructed on self-defense. They rejected that defense. Thus, Appellant's claim that he had a right to instruction on his defense is answered; he claimed self-defense, and he was given the defense instructions. Appellant now argues that instructions on imperfect self-defense should have been included, although he did not raise that defense or request such instructions. We review for plain error. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State,* 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764.

¶5 If imperfect self-defense was ever recognized as a separate legal doctrine in Oklahoma, our current jurisprudence does not do so. Put simply, this is not a thing. It is not recognized as a separate defense in either Oklahoma statutes or case law.[1] Historically, the phrase "imperfect self-defense" referred to a defense which did not justify a homicide, but which might reduce the grade of offense to manslaughter. Rollin M. Perkins, *Criminal Law* 1013 (2d ed. 1969). Appellant implicitly recognizes this. He suggests that heat of passion manslaughter is similar to, but not the same as, imperfect self-defense, arguing that imperfect self-defense "amounts to self-defense but for some legal technicality." For example, *Wood v. State*, discussing manslaughter, notes that a killing done in "passion resulting from fright or terror . . . may be closely akin to a killing in self-defense." Wood v. State, 1971 OK CR 232, ¶ 9, 486 P.2d 750, 752. Wood further describes manslaughter as a killing where the offender believed he was in great danger and "acting in self-defense was not himself free from blame." *Id.* Appellant suggests that this language in *Wood* refers to the doctrine of imperfect self-defense. Wood does not delineate a separate defense of imperfect self-defense. Instead, it describes some conditions which satisfy elements of manslaughter. *See also McHam*, 2005 OK CR 28, ¶ 14, 126 P.3d at 668 (citing Wood, finding that heat-of-passion manslaughter instruction may be warranted where self-defense mitigated but did not negate culpability). Similarly, *Davis v. State* held that where a jury "might conclude that the defendant's self-defense claim is 'imperfect,'" and sufficient to mitigate but not negate culpability, a court might instruct on heat-of-passion manslaughter. *Davis*, 2011 OK CR 29, ¶ 109, 268 P.3d at 117-18. This language unmistakably explains that some form of manslaughter instruction may be appropriate where a self-defense claim fails. It does not create or recognize imperfect self-defense as a separate defense and explicitly rejects the idea of any separate instruction on imperfect self-defense.

¶6 Appellant admits that there is no uniform instruction for imperfect self-defense. He argues that trial courts should use either the heat-of-passion manslaughter instruction or the instruction on manslaughter by resisting criminal attempt, or fashion an instruction from the manslaughter instructions and the facts. Appellant fundamentally misunderstands the law. Appellant suggests that this Court once required an instruction on imperfect self-defense whenever self-defense instruc-

tions would be given. *Morgan v. State*, 1975 OK CR 89, ¶ 8, 536 P.2d 952, 956, *overruled by Walton v. State,* 1987 OK CR 227, ¶ 9, 744 P.2d 977, 978-79. *Morgan* explicitly discussed instructions for various degrees of *manslaughter* when self-defense instructions were given; it was overruled in *Walton* when this rule was found to be too inflexible. Oklahoma does not recognize "imperfect self-defense" as a separate defense. The trial court could not have instructed on it. There is no error, and thus no plain error. This proposition is denied.

¶7 In Proposition III Appellant claims trial counsel was ineffective. He must show that counsel's performance was deficient, and that the deficient performance was prejudicial. *Miller v. State*, 2013 OK CR 11, ¶ 145, 313 P.3d 934, 982; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Appellant must show he was prejudiced by counsel's acts or omissions, and we may dispose of his claim if he fails to do so. *Marshall v. State,* 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481; *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-14, 146 L. Ed.2d 389 (2000); *Strickland,* 466 U.S. at 693, 104 S.Ct. at 2067. Appellant claims counsel should have requested jury instructions on imperfect self-defense. As we found in Proposition II, imperfect self-defense does not exist in Oklahoma law. Appellant can show no prejudice from counsel's failure to request such an instruction. Trial counsel was not ineffective and the proposition is denied.

¶8 In Proposition IV Appellant claims the accumulation of error denied him a fair trial. We found no errors in the preceding propositions. Where there is no error, there will be no cumulative error. *Engles v. State,* 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315. This proposition is denied.

DECISION

¶9 The Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY
THE HONORABLE JAMES M. CAPUTO,
DISTRICT JUDGE

ATTORNEYS AT TRIAL

MJ Denman, 616 S. Main, Ste. 204, Tulsa, OK 74119, Counsel for Defendant

Isaac Shields, Mark Morgan, Asst. District Attorneys, 500 S. Denver, Ste. 900, Tulsa, OK 74103, Counsel for the State

ATTORNEYS ON APPEAL

Michael Morehead, Homicide Direct Appeals Div., Okla. Indigent Defense Sys., P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, William R. Holmes, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

OPINION BY KUEHN, J.
LUMPKIN, P.J.: SPECIALLY CONCURS
LEWIS, V.P.J.: CONCUR
HUDSON, J.: CONCUR
ROWLAND, J.: CONCUR

LUMPKIN, PRESIDING JUDGE: SPECIALLY CONCURRING

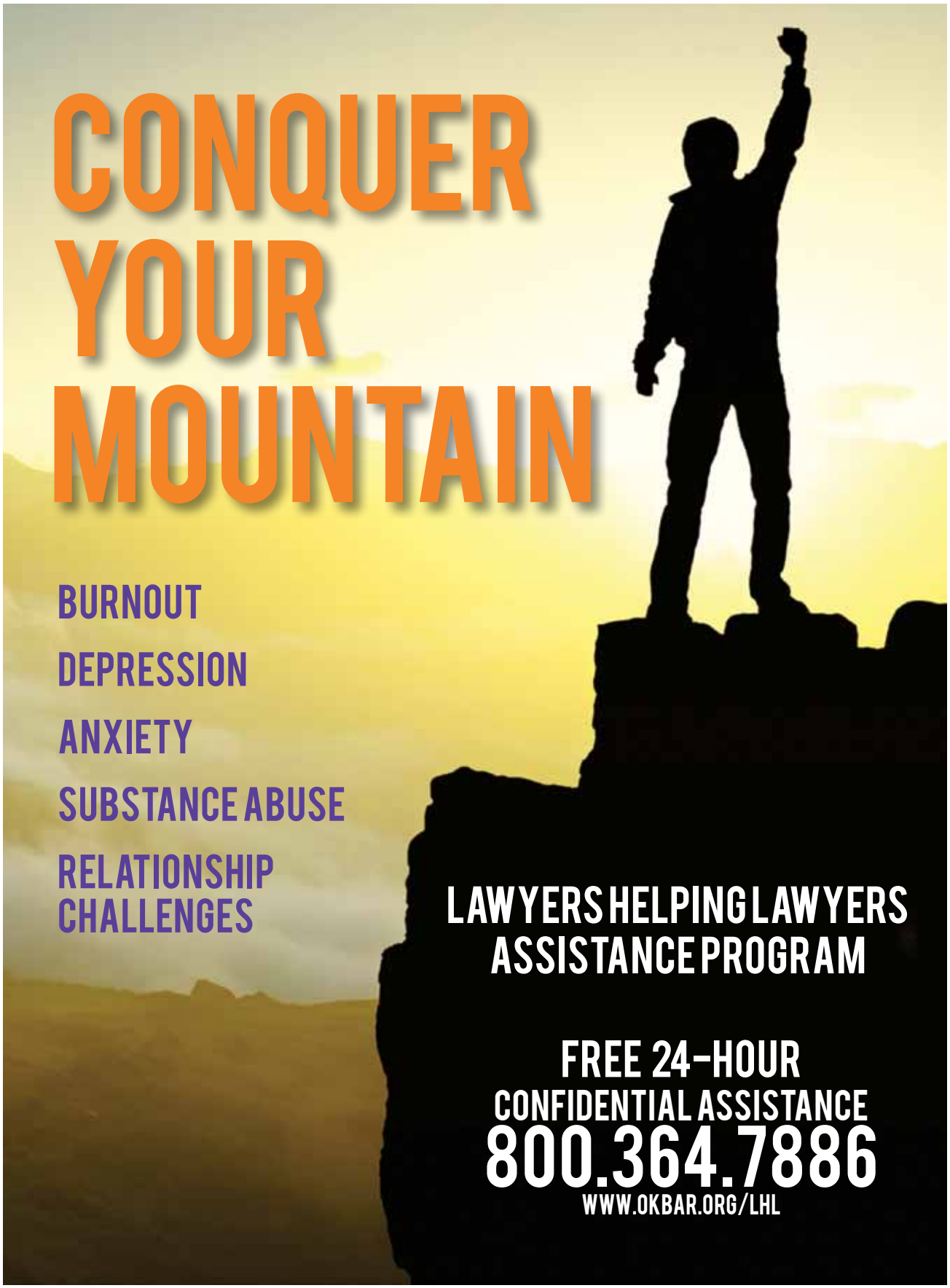
¶1 I compliment my colleague for setting the record straight regarding the concept of imperfect self-defense. I agree that this is not a recognized defense in Oklahoma.

¶2 I write further to remind our readers of the standard which we use to determine whether there is sufficient evidence. This Court reviews challenges to the sufficiency of the evidence under the test set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Easlick v. State,* 2004 OK CR 21, ¶¶ 5, 15, 90 P.3d 556, 558-59; *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. Taking the evidence in the present case in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the charged offense, including that Appellant did not act in self-defense, beyond a reasonable doubt.

¶3 Similarly, I want to remind our readers that this Court reviews for plain error pursuant

to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690 to determine whether the appellant has shown an actual error, which was plain or obvious, and which affects his substantial rights. *Lamar v. State*, 2018 OK CR 8, ¶ 40, 419 P.3d 283, 294. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* I agree that Appellant has not shown the existence of an actual error in the jury instructions in the present case.

1. Appellant states without citation to authority that "imperfect self-defense" has been recognized in Oklahoma since before statehood. In fact, manslaughter has been recognized as the crime midway on the spectrum between self-defense and murder. Even in states which explicitly recognize the doctrine as a defense, a successful claim of imperfect self-defense results in a conviction for some form of manslaughter. *See, e.g., People v. Lam Thanh Nguyen*, 354 P.3d 90, 115-16 (S. Ct. Ca. 2015); *State v. Ramseur,* 739 S.E.2d 599, 607 (Ct. App. N.C. 2013); *Commonwealth v. Rivera*, 983 A.2d 1211, 1224-25 (S.Ct. Pa. 2009); *State v. Marr*, 765 A.2d 645, 648-49 (Ct.App. Md. 2001); *Elliott v. Commonwealth*, 976 S.W.2d 416, 419-20 (S.Ct. Ky. 1998); *Swann v. United States,* 648 A.2d 928, 930 (D.C. Ct. App. 1994).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2019 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 7, 2018

OFFICERS
President-Elect
Current: Charles W. Chesnut, Miami
Mr. Chesnut automatically becomes OBA president Jan. 1, 2019
(One-year term: 2019)
Nominee: **Susan B. Shields, Oklahoma City**

Vice President
Current: Richard Stevens, Norman
(One-year term: 2019)
Nominee: **Lane R. Neal, Oklahoma City**

BOARD OF GOVERNORS
Supreme Court Judicial District Three
Current: John W. Coyle III, Oklahoma City
Oklahoma County
(Three-year term: 2019-2021)
Nominee: **David T. McKenzie, Oklahoma City**

Supreme Court Judicial District Four
Current: Kaleb K. Hennigh, Enid
Alfalfa, Beaver, Beckham, Blaine, Cimarron, Custer, Dewey, Ellis, Garfield, Harper, Kingfisher, Major, Roger Mills, Texas, Washita, Woods and Woodward counties
(Three-year term: 2019-2021)
Nominee: **Vacant**

Supreme Court Judicial District Five
Current: James L. Kee, Duncan
Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties
(Three-year term: 2019-2021)
Nominee: **Vacant**

Member At Large
Current: Alissa Hutter, Norman
Statewide
(Three-year term: 2019-2021)
Nominee: **Josh D. Lee, Vinita**

SUMMARY OF NOMINATIONS RULES

Not less than 60 days prior to the annual meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the executive director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such judicial district, or one or more county bar associations within the judicial district may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the annual meeting, 50 or more voting members of the OBA from any or all judicial districts shall file with the executive director a signed petition nominating a candidate to the office of member at large on the Board of Governors, or three or more county bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the annual meeting, 50 or more voting members of the association may file with the executive director a signed petition nominating a candidate for the office of president elect or vice president, or three or more county bar associations may file appropriate resolutions nominating a candidate for the office.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Elections for contested positions will be held at the House of Delegates meeting Nov. 9, during the Nov. 7-9 OBA Annual Meeting.

Terms of the present OBA officers and governors will terminate Dec. 31, 2018.

Nomination and resolution forms can be found at www.okbar.org/governance/bog/vacancies.

Oklahoma Bar Association Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

OFFICERS
President-Elect
Susan B. Shields, Oklahoma City

Nominating Petitions have been filed nominating Susan B. Shields for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019.

A total of 528 signatures appear on the petitions.

Vice President
Lane R. Neal, Oklahoma City

Nominating Petitions have been filed nominating Lane R. Neal for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019.

A total of 119 signatures appear on the petitions.

BOARD OF GOVERNORS
Supreme Court Judicial District No. 3
David T. McKenzie, Oklahoma City

Nominating Petitions have been filed nominating David T. McKenzie for election of Supreme Court Judicial District No. 3 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019. Twenty-five of the names thereon are set forth below:

Garvin A. Isaacs, Henry A. Meyer III, Joe E. White Jr., Vicki Behenna, Russell E. Mulinix, Joseph K. Goerke, Tommy Adler, Malcolm M. Savage, Thomas Kendrick, Tim Martin, Tony Coleman, Perry Hudson, Glen Mullins, Kevin Krahl, Ted Matthew Smith, Elliott Crawford, Edward J. Kumiega, Donald Fred Doak, Lawrence Goodwin, Billy Coyle, Joel Hall, Carl Hughes, Jaye Mendros, Jarrod Stevenson and Scott Anderson

A total of 56 signatures appear on the petitions.

Member at Large
Josh D. Lee, Vinita

Nominating Petitions have been filed nominating Josh D. Lee, Vinita for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019. Fifty of the names thereon are set forth below:

Brian Morton, Mark Antinoro, John Weedn, Sonja Porter, Cassandra L. Coats, Clayton Baker, Tommy R. Dyer Jr., Betty Garrett Wood, Michael Bryce Lair, John Hunsucker, Bruce Edge, Christy Wright, John Thomas, Laurie Koller, D. Mitchell Garrett, Jim Elias, Ashley Kane, Jason Edge, Melanie Lander, Stephen Edge, Angela Sonaggera, Douglas Baxter, R. Matt Whalen, J. Ken Gallon, Andrew Meloy, Christopher Garner, E. Zach Smith, Jenny Sanbrano, Larry E. Rahmeier, A. Craig Tomlin, Bennett Abbott, Deb Jacobson, Christopher Camp, Marty Meason, Rodney Ramsey, Remona K. Colson, Aaron Pembleton, Amy Hart, Bruce Robinett, Bruce Peabody, Kinder Shamhart, Kevin Carlson, Burl O. Estes, Rick Tucker, P. Scott Buhlinger, Bernadetta Gilbert, Bobby C. Ramsey, Jennifer Tupps, Kyle Persuad and Kristin Greenhaw

A total of 55 signatures appear on the petitions.

Opinions of Court of Civil Appeals

2018 OK CIV APP 54

STATE OF OKLAHOMA, ex rel. DEPARTMENT OF TRANSPORTATION, Plaintiff/Appellee, vs. H&L DOUBLE MC, LLP, a Limited Liability Partnership of Grandfield, OK, Defendant/Appellant, and LEON McCOMBER, member; HUGH McCULLOUGH, member; LIBERTY NATIONAL BANK; and THE COTTON COUNTY BOARD OF COMMISSIONERS, Defendants.

Case No. 115,329. April 10, 2018

APPEAL FROM THE DISTRICT COURT OF COTTON COUNTY, OKLAHOMA

HONORABLE MICHAEL C. FLANAGAN, TRIAL JUDGE

AFFIRMED

Eugene Bertman, McCORMICK & BRYAN, PLLC, Norman, Oklahoma, for Plaintiff/Appellee

Chris A. Tytanic, Oklahoma City, Oklahoma, for Defendant/Appellant and Defendant Leon McComber

Stratton Taylor, Clint Russell, TAYLOR, FOSTER, MALLETT, DOWNS, RAMSEY & RUSSELL, Claremore, Oklahoma, for Enable Midstream Partners, L.P., as Amicus Curiae

JERRY L. GOODMAN, JUDGE:

¶1 This appeal arises from a condemnation action initiated by the State of Oklahoma ex rel. Department of Transportation (ODOT) seeking to acquire certain property of H&L Double MC, LLP (H&L). H&L appeals from the trial court's August 11, 2016, journal entry memorializing a jury verdict. The issue on appeal is whether the trial court properly admitted ODOT's expert's appraisal and testimony concerning its valuation method. Based upon our review of the facts and applicable law, we affirm.

BACKGROUND

¶2 In 2012, ODOT filed two petitions pursuant to its power of eminent domain seeking to take 3.36 acres of H&L's property in order to complete a highway expansion. The trial court consolidated the two cases for trial. Independent commissioners were appointed to appraise the land, who determined that just compensation due H&L was $103,850.00. ODOT and H&L both filed timely demands for a jury trial, although H&L later withdrew its demand.

¶3 A trial was conducted in October of 2013, where the jury returned a verdict determining the value of the taking to be $30,400.00. However, the verdict contained an additional notation in parenthesis stating twenty-two cents a square foot. Because the verdict was unable to be reconciled, H&L filed, and the trial court granted, a motion for new trial. ODOT appealed and the Court of Civil Appeals (COCA) affirmed the granting of a new trial.

¶4 Upon remand, H&L filed a motion in limine, seeking to prohibit the introduction of ODOT's expert appraiser R.D. Grace's Appraisal or any testimony relating thereto. By order entered on April 11, 2015, the trial court denied H&L's motion in limine. The case proceeded to a second trial on April 11-12, 2015. At trial, H&L renewed its objection to Grace's Appraisal and corresponding testimony, which the trial court denied. Grace testified his job was to establish an opinion of market value and in so doing, he used the larger parcel methodology, which included a sales comparison approach to valuation.[1] Grace stated the larger parcel methodology is based upon use, contiguity, and ownership. With respect to use, he stated the property's highest and best use was rural residential/agricultural.[2] Further, the property was clearly contiguous and under one ownership.[3] Grace determined that the larger parcel was approximately 83.2 acres and that the property to be taken, 3.36 acres, had a value as it contributes to the larger parcel because "in and of itself is not marketable and it's not useable."[4] Grace next looked at six comparable sales. After considering the comparisons, Grace ultimately valued the property at $4,500.00 per acre using the comparable sales approach. This came to a total value for the property taken to $15,165.00 and $16,250.00 in damages to the remainder.

¶5 The jury subsequently returned a verdict of $33,000.00. A journal entry of judgment memorializing the verdict was filed on August 11, 2016. H&L appeals.

STANDARD OF REVIEW

¶6 Trial court decisions concerning admission of evidence are reviewed on appeal pursuant to an abuse of discretion standard. *Myers v. Missouri Pac. R. Co.*, 2002 OK 60, ¶ 36, 52 P.3d 1014, 1033.

ANALYSIS

¶7 On appeal, H&L asserts the trial court erred in the admission of ODOT's expert appraiser R.D. Grace's Appraisal and his testimony regarding the same. H&L asserts Grace's Appraisal was based on a "larger parcel" valuation method that was held unconstitutional in *State ex rel. Dept. of Transportation v. Caliber Development Co., LLC*, 2016 OK CIV APP 1, 365 P.3d 1067 (approved for publication by the Oklahoma Supreme Court).

¶8 Contrary to H&L's assertion, Caliber did not hold that the larger parcel method of valuation was unconstitutional. In *Caliber,* ODOT sought to take approximately 25.12 acres of Caliber's property closest to State Highway 74 for purposes of a highway expansion. Prior to the condemnation action, Caliber had obtained a planned unit development (PUD) of its property. The PUD consisted of 225 acres which directly abutted State Highway 74, with 125 acres for commercial development. Both parties demanded a jury trial.

¶9 Caliber filed a motion in limine, seeking to exclude ODOT's expert's opinion of the property based on the "slide-back" or backland appraisal theory. In essence, the theory provides ODOT's highway expansion did not take the landowner's valuable highway frontage or corners because new frontage and corners would exist after the expansion; the previous frontage and corners would merely slide-back to a new location. *Id.* at ¶ 7, at 1071. "As a result, [the expert's opinion] was based on his valuation of the 'backland,' a part of the property owned by Caliber within which the property was taken but having uniform value independent of any increased value resulting from its location adjacent to the highway." *Id.* The trial court reserved ruling on the motion in limine until trial. During direct examination of the expert, Caliber renewed its objection to any testimony regarding the slide-back theory, which the court sustained.

¶10 ODOT's expert also testified about another valuation method he used in valuing the property, the larger parcel method. The expert explained it was a four part process: 1) the appraiser identifies a larger tract of land within which the property taken is located; 2) the appraiser determines the highest and best use for the property; 3) because only part of Caliber's property was taken, the appraiser was required to determine if there was any damage to the property not taken; and 4) subtract any benefit to the property not taken resulting from improvements created by the taking. *Id.* at ¶¶ 13-16, at 1072-73. During this testimony, however, the expert again testified regarding corners and frontage, stating the State was not acquiring it. Caliber objected, and after a conference with the court, the trial court granted Caliber's motion in limine and instructed that any further testimony in the form of slide-back or backland valuations was not admissible and could result in the striking of his entire testimony. *Id.* at ¶ 16, at 1073.

¶11 The jury ultimately returned a verdict in favor of Caliber in the amount of $2,670,351.00. ODOT appealed asserting, inter alia, the trial court erred in:

> 1) excluding the testimony of its expert witness regarding the slide-back valuation method; and 2) limiting the scope of the expert's testimony regarding the value of the larger parcel from which the property was taken. On appeal, COCA affirmed the trial court's decision to exclude the expert's testimony, holding the slide-back method "conflicts with the constitutionally specified manner for determining just compensation." *Id.* at ¶ 11, at 1072. With respect to the larger parcel method, COCA found the expert was permitted to extensively testify about the valuation method. Contrary to H&L's assertions on appeal, COCA did not address nor hold it was a constitutionally invalid valuation method.

¶12 In the present case, Grace specifically testified, and a review of the Appraisal indicates, that he used the larger parcel valuation method in determining a value for the property. H&L has not provided this Court with any authority that this is a constitutionally invalid valuation method. Accordingly, H&L has not shown the trial court abused its discretion in permitting the Appraisal and testimony at trial. This assertion of error is therefore denied.

¶13 H&L further asserts Grace's Appraisal was based on the unconstitutional "before-and-after" valuation method, citing *Caliber,* 2016 OK CIV APP 1, at ¶ 10, 365 P.3d at 1072; and *Williams Natural Gas Co. v. Perkins*, 1997 OK 72, ¶ 4, 952 P.2d 483, 486. We disagree. A review of the record provides Grace's Appraisal and testing were based on the larger parcel method. Accordingly, we find no abuse of discretion by the trial court in permitting Grace's Appraisal and testimony at trial. This assertion of error is therefore denied.

¶14 **AFFIRMED**.

BARNES, P.J., and RAPP, J., concur.

June 27, 2018

ORDER

State of Oklahoma, *ex rel.* Department of Transportation's motion to publish opinion is granted. Pursuant to Okla. Sup. Ct. Rule 1.200, 12 O.S. ch. 15, app. 1, the Opinion issued by this Division on April 10, 2018, is hereby releasedfor publication by order of this Court.

IT IS SO ORDERED this 25th day of June, 2018. ALL JUDGES CONCUR.

DEBORAH B. BARNES
Presiding Judge
Division IV

JERRY L. GOODMAN, JUDGE:

¶1 This appeal arises from a condemnation action initiated by the Sta

JERRY L. GOODMAN, JUDGE:

1. Trial vol. 1, pg. 10, ln. 17-20.
2. To make this determination, Grace viewed the property, considered any utilities available to determine the potential for development, as well as determined the potential for any commercial development.
3. Trial vol. 1, pg. 12, ln. 14-22.
4. Trial vol. 1, pg. 54, ln. 8-11.

Calendar of Events

August

28 **OBA General Practice/Solo and Small Firm Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Ashley B. Forrester 405-974-1625

29 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Melissa R. Lujan 405-600-7272

30 **OBA Awards Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Jennifer Castillo 405-553-3103

September

3 **OBA Closed** – Labor Day

4 **OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600

6 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

7 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

14 **OBA Law-Related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Amber Peckio Garrett 918-895-7216

15 **OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nathan Richter 405-376-2212

17 **OBA Board of Editors meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Melissa DeLacerda 405-624-8383

18 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Rod Ring 405-325-3702

OBA Women in Law Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Melanie Christians 405-705-3600 or Brittany Byers 405-682-5800

19 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Jeffrey H. Crites 580-242-4444

OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Valery Giebel 918-581-5500

OBA Clients' Security Fund Committee meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Micheal Salem 405-366-1234

20 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-267-0672

OBA Professionalism Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda Scoggins 405-319-3510

21 **OBA Board of Governors meeting;** 10 a.m.; Stillwater; Contact John Morris Williams 405-416-7000

25 **OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Rod Ring 405-325-3702

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, August 9, 2018

F-2017-1052 — Appellant Prentice Ponds was tried by jury and convicted of Robbery by Force or Fear (Count I) (21 O.S.2011, § 791) and Fraudulent Insurance Claim (Count II) (21 O.S. Supp.2012, § 1662), both counts After Former Conviction of Two or More Felonies, in the District Court of Tulsa County, Case No. CF-2016-2270. The jury recommended as punishment life in prison in Count I and twenty-five (25) years in prison in Count II. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Specially Concurs; Hudson, J., Concur; Kuehn, J., Concurs in Results; Rowland, J., Concur.

RE-2017-871 — On August 29, 2002, Appellant Gary Wurtz entered a plea of guilty to Count 1 – First Degree Rape, Count 2 – First Degree Rape, Count 3 – Rape by Instrumentation, Count 4 – Lewd Molestation, and Count 5 – Child Abuse in Seminole County District Court Case No. CF-2002-223. He was convicted and sentenced to twenty years imprisonment, with all but the first fifteen years suspended. On May 30, 2017, the State filed a Motion to Revoke Appellant's suspended sentence. Following a hearing on the motion, the Honorable George Butner, District Judge, found Appellant had violated his rules and conditions of probation and revoked Appellant's remaining suspended sentence in full. Appellant appeals. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2017-487 — Matthew A. Avelar, Appellant, was tried and convicted at a bench trial of Child Sexual Abuse, in Case No. CF-2013-317, in the District Court of McCurtain County. The Honorable Gary L. Brock, Special Judge, sentenced Appellant to twenty-three years imprisonment plus costs. From this judgment and sentence Matthew A. Avelar has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2017-571 — Patsy Ann Duke, Appellant, was tried by jury for the crimes of Count 1: Illegal Entry and Count 3: Knowingly Concealing Stolen Property, in Case No. CF-2015-245C, in the District Court of McIntosh County. The jury returned a verdict of guilty and recommended as punishment one year in the county jail on Count 1 and two years imprisonment on Count 3. The Honorable James D. Bland, District Judge sentenced accordingly and ordered both counts to run concurrently. From this judgment and sentence Patsy Ann Duke has perfected her appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2017-246 — Jon Brandon Scarce, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2015-4288 in the District Court of Muskogee County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Jon Brandon Scarce has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2016-893 — Kenneth Richard Smith, Appellant, was tried by jury for the crime of first degree (malice) murder in Case No. CF-2015-882 in the District Court of Muskogee County. The jury returned a verdict of guilty and set punishment at life imprisonment without parole. The trial court sentenced accordingly. From this judgment and sentence Kenneth Richard Smith has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs in results.

F-2017-119 — Kenneth Lee Hopkins, Appellant, was tried by jury for the crime of First Degree Murder (two counts) in Case No. CF-2016-530 in the District Court of Tulsa County. The jury returned verdicts of guilty

and set punishment at life imprisonment without the possibility of parole and a $10,000.00 fine on each count. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Kenneth Lee Hopkins has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-506 — Terome Levi Porter, Appellant, was tried by jury for the crime of Conspiracy (Count 1) in Case No. CF-2014-840 in the District Court of Kay County. The jury returned a verdict of guilty and set punishment at nine months imprisonment. The trial court sentenced accordingly and ordered Porter's sentence to run consecutively to his sentences in CF-2007-227, CF-2010-427, and CF-2011-748. From this judgment and sentence Terome Levi Porter has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

PCD-2017-378 — Isaiah Glenndell Tryon, Petitioner, was tried by jury in the District Court of Oklahoma County, Case No. CF-2012-1692, and convicted of Murder in the First Degree. In a separate capital sentencing phase, Petitioner's jury found the existence of four statutory aggravating circumstances and sentenced Petitioner to death. The Honorable Cindy H. Truong, District Judge, presided over the trial and sentenced accordingly. This Court affirmed Petitioner's conviction and death sentence on direct appeal after striking the serving a sentence of imprisonment aggravator and conducting reweighing. *Tryon v. State*, 2018 OK CR 20, __P.3d___. Petitioner filed with this Court an original application for post-conviction relief and in a separate motion requested an evidentiary hearing and a motion to substitute original documents for previously filed faxed/electronic copies. Upon review, we conclude that Petitioner's Original Application for Post-Conviction Relief is DENIED. Petitioner's Motion for Evidentiary Hearing on Post-Conviction Claims is DENIED. Petitioner's Motion to Substitute Original Document for Previously Filed Faxed/Electronic Copies is GRANTED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Recuses.

C-2017-458 — Danielle Marie Harris, Petitioner, entered a negotiated plea of guilty in Oklahoma County District Court Case No. CF-2017-260 to the crimes of Count 1 – Possession of Methamphetamine and Count 2 - Possession of Drug Paraphernalia. She was sentenced, pursuant to the agreement, to five years imprisonment on Count 1 and one year on Count 2, with both terms suspended and to be served concurrently with each other. On March 28, 2017, Petitioner, by pro se letter to the court, asked to withdraw her plea. Petitioner's counsel followed up with a formal motion to withdraw guilty plea on March 29. A second motion to withdraw was filed by different appointed counsel on March 30. The District Court denied Petitioner's request to withdraw her plea. Danielle Marie Harris has timely perfected her certiorari appeal. Petition for Certiorari GRANTED; the District Court's denial of Petitioner's Motion to Withdraw Plea VACATED, and the case is REMANDED FOR FURTHER PROCEEDINGS. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., dissent; Rowland, J., concur.

COURT OF CIVIL APPEALS
(Division No. 2)
Friday, August 3, 2018

116,366 — City of Tulsa and Own Risk #10435, Petitioners, vs. John Prear and The Workers' Compensation Commission, Respondents. Proceeding to review an order of the Workers' Compensation Commission En Banc, Hon. Tara A. Inhofe, Administrative Law Judge (ALJ), affirming the decision of the ALJ finding compensability and authorizing medical treatment for John Prear (Claimant). City asserts Claimant's claim is barred by the statute of limitations because the date of awareness is the date of injury where there is cumulative trauma and that the claim was barred by the one-year statute of limitations when the CC Form 3 was filed out of time. We are not persuaded by City's argument for the reasons set out in *Rolled Alloys, Inc. v. Wilson,* 2018 OK CIV APP 43, 418 P.3d 713, in which we held that where there was a cumulative trauma injury, the statute of limitations began to run on the date of last exposure. We also conclude the Workers' Compensation Commission (WCC) sufficiently set out its reason for deviating from the independent medical examiner's opinion. City further alleges Claimant's evidence does not support an award of medical treatment. Claimant's expert stated Claimant would require further treatment which would probably include surgery on his left knee, rehabilitation, and conservative treatment to his right knee in the form of cortisone injections, medicines, and

therapy. This report supports the WCC's decision to award medical treatment. Although the IME did not recommend treatment, he did not exclude it and advised future measures would be recommended should symptoms increase or change. The WCC's decision authorizing medical treatment and requiring City to designate a treating physician is supported by the record. Finding no error, we sustain the WCC's order affirming the ALJ's order determining Claimant's claim is compensable and authorizing medical treatment. SUSTAINED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

(Division No. 3)
Friday, August 10, 2018

115,966 — In Re the Marriage of Sylvia E. Qualls, Petitioner/Appellee, v. Bruce A. Qualls, Respondent/Appellant. Appeal from the District Court of Comanche County, Oklahoma. Honorable Gerald Neuwirth, Judge. Respondent/Appellant Bruce A. Qualls seeks review of the trial court's order granting the motion to vacate divorce decree filed by Petitioner/Appellee Sylvia E. Qualls for alleged fraud. In this appeal, Husband asserts Wife failed to prove fraud by clear and convincing evidence as to warrant vacation of the parties' divorce decree. During discovery, Husband reported income from Social Security, Veterans Administration disability and "retirement." However, at the time of the divorce, Husband received no payments of military retirement, but only payments of Social Security, veterans' disability and Combat Related Special Compensation. In response to Wife's petition to vacate, Husband argued he had "waived" receipt of his military retirement benefits (a divisible marital asset) in favor of receipt of Combat Related Special Compensation benefits (a non-divisible asset), and that he consequently received no military retirement subject to division. In the present case, Husband represented he received "retirement" benefits without specifying the precise payor of the retirement benefit, whether CRSC, the VA or military retirement. From Husband's discovery responses and his testimony, it was impossible to tell that he received no payments of military retirement. Husband's statements of the sources of his retirement pay were ambiguous, at best. The trial court could have concluded the statements were made either knowing they were false or were made without knowledge of their truth or falsity, constituting actual or constructive fraud in any event. The trial court did not abuse its discretion in vacating the parties' divorce decree for fraud. The order of the trial court is AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

116,908 — Dakota Crow, Plaintiff/Appellant, v. State of Oklahoma, ex rel., Department of Public Safety, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Donald L. Easter, Judge. Plaintiff/Appellant, Dakota Crow, appeals from the trial court's judgment in favor of Defendant/Appellee, State of Oklahoma, ex rel., Department of Public Safety (DPS), in this action involving the denial of Plaintiff's request to sequester witnesses at his DPS hearing. We AFFIRM. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

(Division No. 4)
Thursday, August 2, 2018

116,088 — In the Matter of the Estate of Michael S. Phillips, Deceased, Problem Solved Plumbing, LLC, and Guarantee Insurance, Appellants, v. Denise Martinez, Appellee. Appeal from an Order of the District Court of Cleveland County, Hon. Stephen Bonner, Trial Judge, denying Employer Problem Solved Plumbing's and Insurance Company Guarantee In-surance's respective motions to intervene and motions to vacate the trial court's order appointing Denise Martinez (Spouse) as personal representative in the estate of Michael Phillips (Decedent). Employer alleges it was entitled to notice of the Decedent's probate proceeding because it contends Spouse was not in fact Decedent's wife and is therefore not entitled to Workers' Compensation death benefits. We find that to allow Employer and Insurance Company the opportunity to disqualify Spouse as personal representative of the Decedent's estate would be to unilaterally dictate the course of the workers' compensation claim in its favor, to the detriment of the Decedent's estate. Clearly, Employer was not an heir of Decedent's and had no interest in who was appointed personal representative of its deceased employee's estate. Also, at the time of the hearing for letters testamentary, there was no workers' compensation claim pending. Employer had no interest to protect requiring intervention because that interest (the workers' compensation claim) was not even in existence. As such, the 12 O.S. 2011, § 2024(A)(2) requirement of an interest in the property is not satisfied. We therefore find that the trial court properly denied intervention in this case. We further conclude that be-cause

the motions to intervene fail, the motions to vacate cannot be entertained, and the trial court's orders are affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

116,619 — Don Allen Cantrell, Petitioner, vs. Multiple Injury Trust Fund and The Workers' Compensation Court, Respondents. Proceeding to review an order of a three-judge panel of the Workers' Compensation Court of Existing Claims, Hon. Margaret A. Bomhoff, Trial Judge, affirming the trial court's order denying Claimant benefits. The trial judge found Claimant was a previously impaired person, but not permanently totally disabled, and therefore not entitled to benefits from the Multiple Injury Trust Fund (MITF). Our review of this record leads us to conclude the trial court's order was supported by competent evidence. The three-judge panel's affirmance was therefore correct. We sustain the order under review. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Tuesday, August 7, 2018

115,737 — Michael S. Smith and Jill Smith, husband and wife, Plaintiffs/Judgment Creditors/Appellees, v. Wayne Griffiths Homes, Inc., an Oklahoma corporation, Defendant/Judgment Debtor, and Mid-Continent Casualty Company, an Ohio corporation, Garnishee/Appellant. Appeal from the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. This appeal arises from a garnishment proceeding. Plaintiffs (the Smiths) filed a garnishment affidavit after obtaining a jury verdict against Defendant (WGH), an entity insured by Garnishee (Mid-Continent). The circumstances of this case stretch back to 2004, when the Smiths entered into a contract with WGH for the construction of a home. In 2010, the Smiths brought suit against WGH, and the matter was tried to a jury in 2014. The Smiths prevailed against WGH under their breach of contract theory, and the Smiths were awarded a verdict against WGH in the amount of $475,000. The jury's verdict was memorialized in a judgment filed in May 2014. This garnishment proceeding was initiated in March 2015 against Mid-Continent. The trial court empaneled a second jury to determine the appropriate amount to be entered against Mid-Continent from the $475,000 total award. After the trial court denied Mid-Continent's motion for a directed verdict, the jury in the garnishment proceeding returned a verdict in favor of the Smiths and against Mid-Continent in the amount of $475,000. This award was memorialized in a judgment filed in November 2016. Mid-Continent then filed a "Motion for Judgment Notwithstanding the Verdict; or, in the Alternative, Motion for New Trial" (motion for JNOV/motion for new trial). The trial court overruled this motion in its order filed in January 2017, from which Mid-Continent appeals. Upon review of only that issue raised in both the motion for JNOV/motion for new trial and in Mid-Continent's appellate brief – i.e., whether Mid-Continent's policies provide any coverage for damages asserted under a breach of contract theory – we conclude the trial court did not err or abuse its discretion in overruling Mid-Continent's motion for JNOV/motion for new trial. This sole issue preserved for appellate review is itself barred by the doctrine of claim preclusion because it was previously asserted and rejected in a prior declaratory judgment action involving the same parties that resulted in a final order. Consequently, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

116,060 — Arvest Bank, as Trustee of the Lawrence Leon Smith and Judy Lee Smith Trust, Dated February 14, 2011, Plaintiff/Appellee, vs. Mary Lorraine Robinson, Defendant/Appellant. Appeal from an Order of the District Court of Washington County, Hon. Russell C. Vaclaw, Trial Judge, granting declaratory judgment to Arvest Bank, as Trustee of the Lawrence Leon Smith and Judy Smith Trust (Arvest). Arvest, as successor Trustee, sued Robinson in Washington County, seeking judgment declaring the rights and obligations of the parties under the Sales Agreement and attached promissory note. Robinson filed a special appearance, motion to quash summons, and motion to dismiss, asserting venue and jurisdiction was proper in Kay County. The court ultimately denied Robinson's motion, and Robinson subsequently filed an answer, asserting promissory estoppel and constructive fraud as affirmative defenses. Following non-jury trial, the court granted Arvest declaratory judgment, finding a valid and enforceable debt obligation. The court further found that neither the Sales Agreement, note, mortgage, nor security agreement contained any promise to forgive Robinson's debt and that any gift or benefit created in the original Trust was revocable. We conclude that the trial court

did not abuse its discretion in finding that venue was proper in Washington County. We further conclude that both promissory estoppel and equitable estoppel are unavailable to Robinson. There is no indication in the record that Robinson relied on a promise in executing the Sales Agreement. Accordingly, these assertions of error are denied, and the trial court's order is affirmed in its entirety. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

116,704 — Doreen Janice Curry, Plaintiff/Appellant, vs. Saint Francis Hospital, Ralph T. Boone, M.D., and Executor of the Estate of Karl Detwiler, M.D., Defendants/Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Daman H. Cantrell, Trial Judge. Doreen Curry (Curry) appeals the trial court order dismissing her malpractice claim against St. Francis Hospital (St. Francis), Ralph Boone, M.D. (Boone), and the Executor of the Estate of Karl Detwiler, M.D. (Detwiler) (Collectively Physicians). The trial court dismissed Curry's claim against the Estate of Karl Detwiler for lack of service. As to St. Francis and Boone, the trial court dismissed her claim without stating its reason for not granting Curry leave to amend her defective petition or alternatively, make a finding why the defect could not be remedied. Though we agree the statute of limitations has run on Curry's medical malpractice claim, and the analysis of the trial court was correct, the order actually filed by the trial court must be reversed for failure to comply with the mandates of 12 O.S.2011, § 2012(G), *Fanning v. Brown*, 2004 OK 7, 85 P.3d 841, *Stauff v. Bartnick*, 2016 OK CIV APP 76, 387 P.3d 356, and *Pellebon v. State ex rel. Bd. of Regents of Univ. of Oklahoma*, 2015 OK CIV APP 70, 358 P.3d 288. Because the order under review, though it may otherwise be correct, fails to comply with the authorities set out above, we reverse it and remand the case to the trial court for further proceedings consistent with the opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp J., concur.

116,068 — Christopher J. Barnett, Plaintiff/Appellant, vs. Daniel Howell, Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Sarah Day Smith, Trial Judge, denying Barnett's motion to vacate and request for new trial. Barnett asserts the trial court abused its discretion in finding that there was insufficient evidence to grant a permanent protective order and by allegedly conducting an independent investigation. After examining the evidence presented by the parties at the hearing, we conclude the trial court did not err in denying Barnett's request for a protective order and subsequent motions to vacate and request for a new trial. The trial court's order is therefore affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Wednesday, August 8, 2018

116,887 — Bank of America, N.A., Plaintiff/Appellee, vs. James Richard and Rosamma Richard, Defendants/Appellants, and David Richard, Spouse, if any, of David Richard; First Commercial Bank, N.A.; Capital One Bank (USA), N.A.; John Doe, a/k/a Phillip Samson; and Jane Doe, a/k/a Rachel Samson, Defendants. Appeal from an Order of the District Court of Canadian County, Hon. Paul Hesse, Trial Judge, granting Bank of America, N.A.'s (BOA) motion for summary judgment. In this suit on a promissory note and for foreclosure of a mortgage, the primary issue on appeal is whether BOA is entitled to judgment as a matter of law. BOA filed a second amended petition, attaching the note with a blank indorsement, rendering it a bearer instrument. Based on our review of the record and applicable law, we find BOA established it was an assignee and holder of the note and mortgage and had standing to seek foreclosure of the mortgage lien. Further, the transaction history provides Homeowners were well behind in paying on the mortgage. Accordingly, we conclude BOA established Homeowners were in default under the terms of the note. The journal entry granting BOA's motion for summary judgment is therefore affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Friday, August 10, 2018

116,976 — Tammy Lou Adamson, a/k/a Tammy Adamson Ballew, Plaintiff/Appellant, v. National American Insurance Company, Defendant/Appellee, and Fletcher D. Handley, Jr., Ashton A. Handley and The Handley Law Center, Defendants. The plaintiff, Tammy Lou Adamson (Adamson) appeals a final order dismissing her action as to the defendant, National American Insurance Company (National). Adamson filed suit against National to obtain a ruling that she is the common law spouse of Ballew. She desires that status in order to qualify

for death benefits under the Administrative Workers' Compensation Act. National and Ballew's daughter challenged venue of the probate and Adamson's claim to be the common-law spouse. The parties reached an agreement whereby Adamson stipulated with National and Ballew's daughter that she was not the common law spouse and that the stipulation was for the purpose of the probate action and any other proceeding. The Appellate Record does not show whether the probate court has entered a final decree in the Ballew probate. After the parties reached their agreement, the probate court entered an Order which memorialized the stipulation. In a subsequent proceeding, Adamson unsuccessfully petitioned to vacate the Order and the Court of Civil Appeals affirmed the denial of the petition to vacate. Thus, the fact that Adamson made the stipulation and its content are settled. National asserted that the doctrines of issue preclusion and judicial estoppel serve to bar Adamson's present lawsuit in which she seeks a ruling as to her spousal status. The trial court agreed and dismissed Adamson's action as to National. The issue on appeal is whether either of the two doctrines applies as a bar to Adamson's action here. A stipulation does not necessarily permit application of the rule of issue preclusion in a subsequent lawsuit because the issue preclusion criterion of "actually litigated on the merits" is absent. However, the stipulation may show that the parties intended the stipulation to have subsequent effect and that intent will cause the stipulation to be binding and issue preclusion to apply. In light of dicta in the Court of Civil Appeals Opinion affirming denial of Adamson's petition to vacate, the scope of the appellate Record, and the standard of review, this Court cannot now conclude that issue preclusion applies. Therefore, to the extent that the trial court relied upon issue preclusion, it erred. Some, but not all, of the elements of judicial estoppel are present. Judicial estoppel bars a party from contradicting a court's determination that was based on that party's position. Here, according to the stipulation in the probate action Adamson's "position" is that she is not the common law spouse. However, a court's determination based on Adamson's position is missing in the appellate Record. Under the appellate Record the trial court erred by granting the motion to dismiss based upon judicial estoppel. Therefore the judgment dismissing Adamson's action against National is reversed. However, the trial court is free to reassess the application of judicial estoppel to Adamson's action against National if there is now, or later, a court's determination of Adamson's spousal status which is based on Adamson's position as memorialized in the May 5, 2014 Order. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Goodman, J., concurs in result.

ORDERS DENYING REHEARING
(Division No. 2)
Thursday, August 2, 2018

116,098 — Kenneth Ray Johnson, individually; and Richard Baldwin, individually, Plaintiffs/Appellants, vs. GEO Group, Inc.; State of Oklahoma, ex rel., Oklahoma Department of Corrections, a state political subdivision, et al., Defendants/Appellees. The Petition for Rehearing fled by the GEO defendants is *DENIED*.

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PERSONAL INJURY ATTORNEY: A Tulsa law firm is looking for an experienced PI attorney or a sharp practitioner interested in developing PI skills. Newly licensed attorney inquiries welcomed. Send replies to "Box F," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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DETECTING DECEPTION:

WHAT LAWYERS CAN LEARN FROM SCIENTISTS

THURSDAY, OCTOBER 18

9 A.M. - 2:50 P.M.

Oklahoma Bar Center

LIVE Webcast Available

FOR INFORMATION OR TO REGISTER, GO TO WWW.OKBAR.ORG/CLE

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FEATURED PRESENTER:

Michael Johnson, *CEO, Clear Law Institute*

Lawyers often try to detect deception when interviewing witnesses and negotiating with opposing counsel. To do so, they often rely on their "gut instinct" and popular stereotypes about how liars behave. However, in recent years, scientists have shown that many popular beliefs about how liars behave are inaccurate.

In this thought-provoking and practical program from former U.S. Department of Justice attorney Michael Johnson, you will learn scientifically validated methods for detecting lies and deception. This engaging presentation will show you how to:

- Spot deception by viewing videos from actual interviews
- Avoid common errors in lie detection
- Identify deception cues related to verbal content, verbal style, and other linguistic cues
- Utilize questioning techniques to more easily differentiate between liars and truth-tellers
- Ask questions designed to increase "cognitive load," making it more difficult for liars to maintain their stories
- Analyze the content of a witness' statement for signs not only of deception but also of truthfulness

Early registration by October 11, 2018, is $225.00. Registrations received after October 11, 2018 will increase to $250.00 and $275.00 for walk-ins. Registration includes continental breakfast and a networking lunch. To receive a $10 discount on in-person programs register online at www.okbar.org/members/CLE. Registration for the live webcast for all members is $250. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

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2018 LABOR AND EMPLOYMENT LAW UPDATE

COSPONSORED BY THE OBA LABOR AND EMPLOYMENT LAW SECTION

SEPTEMBER 13
9 A.M. - 2:50 P.M.

North Hall
700 N Greenwood Avenue
Bank of Oklahoma Room #140

SEPTEMBER 20
9 A.M. - 2:50 P.M.

Oklahoma Bar Center
LIVE Webcast Available

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PROGRAM PLANNER/MODERATOR:

Lauren Lambright, *Smolen, Smolen & Roytman, PLLC, Tulsa Program*
Paige Good, *McAfee & Taft, OKC Program*

TOPICS COVERED:

- **The US Supreme Court's Ruling on Class and Collective Action Waivers in Arbitration Agreements**
- **The #MeToo Movement**
- **Recent Developments with the Fair Labor Standards Act**
- **The Continuing Evolution of Title VII**
- **Ethics in Employment Law**
- **Considerations for Releases, Non-Solicitation, and Confidentiality Agreements**

Early-bird registration by Sept. 6th for Tulsa and Sept. 13th for OKC is $150. Registration received after those dates will be $175 and walk-in registrations are $200. Registration includes continental breakfast and lunch. To receive a $10 discount on in-person programs register online and enter coupon code Fall2018 at checkout. No live webcast available for Tulsa date. Registration for the live webcast is $200. Members licensed 2 years or less may register for $75 for the in-person program (late fees apply) and $100 for the webcast. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.